

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS APPLICATION NO.647 OF 2018
USAFI MARKET VENDORS ASSOCIATION----- APPLICANT

VERSUS
KAMPALA CAPITAL CITY AUTHORITY----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant brought this application under Article 126(2)(e) and Sections 98 of the Civil Procedure Act and Order 1 rule 3 and Order 52 rules 1,2 & 3 of the Civil procedure Rules for the following orders;

- a. An order that the Respondent be added to the arbitration proceedings in CAD/ARB No. 68/2017 as a respondent therein.
- b. An Order directing the respondent to file a statement of defence to the applicant's claim in the arbitration proceedings vide CAD/ARB No. 68/2017.
- c. Costs of the application be in the arbitration cause.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of Kagolo Joseph but generally and briefly state that;

- 1) The applicant instituted a claim vide CAD/ARB No. 68/2017 wherein SAFI NET UGANDA LIMITED and KAMPALA CAPITAL CITY AUTHORITY were the respondents.
- 2) That the said claim was arising out of an arbitration clause contained in sublease agreement that was entered into between the applicant and SAFI NET UGANDA LIMITED in respect of land comprised in Kibuga Block 12, plots 346,347,349, 350, 351, 352, 353, 354, 370, 418, 420, 421 and plots 5-9, on which there was established a market but consequently the said SAFI NET UGANDA LIMITED sold its interest in the said land to the KAMPALA CAPITAL CITY AUTHORITY.
- 3) That in the said sublease agreement, SAFI NET UGANDA LIMITED was liable to the applicant, inter alia for commission, for the applicant's role in mobilising vendors from the streets of Kampala to utilise the market on the said land.
- 4) That in SAFI NET UGANDA LIMITED's Statement of Defence to the relevant arbitration proceedings it denied liability stating inter alia that KCCA purchased the said land and all of SAFI NET UGANDA LIMITED's liabilities in respect of the said land were assigned to KCCA.
- 5) That in any case the respondent was initially a party to the arbitration proceedings for compulsory appointment of an arbitrator, wherein a ruling was made that KCCA and SAFI NET UGANDA LIMITED by the relevant sale documentation of the said property were not conscious of incorporating the arbitration clause in the sublease agreement between the applicant and SAFI NET UGANDA LIMITED.

- 6) That in the said ruling it was advised that the current applicant could frame an application to the High Court for Orders confirming that it is necessary for KCCA to be joined as a party to the arbitration proceedings.
- 7) That the respondent is the one who introduced SAFI NET UGANDA LIMITED to the applicant and even negotiated and facilitated the memorandum of Understanding.
- 8) That it is necessary to join KCCA, the respondent to this arbitration proceedings in order it comprehensively determine the issues and avoid multiplicity of suits.

The respondent opposed this application and filed an affidavit in reply through Ag Manager Land Management Unit-Akena Dickinson Lony.

The respondent contended that upon eviction of street vendors from operating from the streets of Kampala, some of them were relocated to USAFI market which was then privately owned and operated.

That due the continued wrangles and misunderstandings between the market vendors and Safi Net Uganda Limited, the respondent being a Markets Authority, took over the day to day administration of the market.

That the Government of Uganda ultimately decided to acquire the market land and structures from the proprietor, M/s Safi Net Uganda Limited for the establishment of the market.

That the respondent agrees with the contents of the arbitration application and contends that an arbitration clause contained in an agreement signed between the applicant and SAFI NET Uganda Limited

and adds that it was never a party to the purported sublease agreement dated 18th December 2012 nor to the Arbitration clause therein.

That the agreement covenanted that the land was free of any third party rights and claims either expressly or impliedly and that the arbitration clause in the agreement between that applicant and SAFI NET Uganda Limited was never incorporated as part of the land sale and purchase agreement between the respondent and SAFI NET Uganda Limited for it to impose any liabilities on the respondent.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The applicant raised two issues for determination;

1. *Whether this Honourable court has jurisdiction to entertain this application.*
2. *Whether the respondent can be added as a party in arbitration proceedings vide CAD/ARB 68 of 2017.*
3. *What remedies are available to the applicant?*

The applicants were represented by *Mr Sseryanzi Wilberforce* whereas the respondent was represented by *Ms Rita Mutua*.

Whether this honourable Court has jurisdiction to entertain this application.

The applicant contends that this application is unique in its nature and seeks to add the respondent to arbitration proceedings and not an ordinary suit in a civil. The issue of joinder of parties is not expressly provided for

under the Arbitration and Conciliation Act. Therefore according to applicant's counsel Section 98 of the Civil Procedure Act is relevant.

The applicant's counsel is aware that section 9 of the Arbitration and Conciliation Act provides that No court shall intervene in matters governed by the Act except as provided in the Act.

According to the applicant's counsel since the Arbitration and Conciliation Act does not provide for joinder of parties, the cure for this gap lies in Article 139(1) of the Constitution which provides that;

"The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law".

The respondent opposed this application and argued that the Arbitration and Conciliation Act provides a few circumstances when the High Court may intervene in matters touching the Act such for interim measures of protection under section 6, taking evidence section 27, setting aside an arbitral award section 34, bankruptcy section 38 as well as registration of awards.

It is important that I begin by defining arbitration; It is a consensual system of judicature directed to the resolution of commercial dispute in private.

The main and primary consideration in establishing arbitration proceedings is that must contain three fundamentals;

- A dispute between the parties must exist.
- There must be a mutual agreement to settle the dispute by arbitration.
- The parties must have agreed to abide by the decision of arbitrator(s).

It is important to draft the arbitration clauses with precision and avoid ambiguities later in order to fill the void. It would become a failed process once every issue that arises in the arbitration process ends up in court.

The question of jurisdiction of court is very important in determining the authority to be exercised by the court as it was explained in **Koboko District Local Government vs Okujjo Swali High Court Miscellaneous Application No. 001 of 2016** where *Justice Stephen Mubiru* noted that;

“One of the “policies of court” is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. Jurisdiction is the first test in the legal authority of a court and its absence disqualifies the court from exercising any of its powers. Jurisdiction means and includes any authority conferred by the law upon the court to decide or adjudicate any dispute between the parties or pass judgment or order. A court cannot entertain a cause which it has no jurisdiction to adjudicate upon.”

The high court has limited jurisdiction in arbitration matters as set out under the Arbitration and Conciliation Act. Section 9 expressly provides; No Court shall intervene in matters governed by the Act, except as provided in the Act.

This limitation of jurisdiction should be appreciated from the stand point that Alternative Dispute Resolution is a legal technique used to resolve disputes out of the court room.

This issue is resolved in the negative.

Whether the respondent can be added as a party in arbitration proceedings vide CAD/ARB 68 of 2017.

The applicant submitted that this court has inherent powers to add a party to arbitration proceedings if the ends of justice demand, and the principles to be considered are similar to the principles governing joinder of parties in an ordinary civil suit.

The present application arose out of the statement of defence of Safi Net Uganda Limited wherein *it denied liability stating that KCCA purchased the said land and all of Safi Net Uganda Limited's liabilities in respect of the said land were assigned to KCCA.*

It is this statement that the liabilities of Safi Net Uganda were assigned to KCCA triggered the need to add them as necessary party in order to determine the disputes therein.

The respondent on the other hand contended that arbitration clause is only enforceable by a party to an agreement containing an arbitration clause and in this case, the rightful parties to invoke and be party to arbitration proceedings in the said 2012 sublease agreement.

The respondent was never a party to the sublease agreement and is not bound either by the terms of sublease nor the arbitration clause. The arbitration clause in the 2012 sublease between the applicant and Safi Net Uganda Limited was never incorporated in the 2015 land sale agreement between the respondent and Safi Net Uganda Limited for it to impose any obligations or liabilities on the respondent.

Arbitration has long been called a creature of contract, a dispute resolution mechanism that has no form or validity outside the four corners of the parties' arbitration agreement.

Relying on an interpretation of arbitration as a contractual construct, if the parties to the arbitration do not agree to joinder or intervention, neither the courts nor the arbitral tribunal can order such measures. As the argument

goes, to allow joinder or interest in would be akin to rewriting the contract and upsetting the dispute resolution mechanism bargained for by the parties.

In addition, strict contractualists argue that because arbitral authority is limited to the terms of the contract, an arbitrator would have no power to hear the joined dispute unless the party to be joined either expressly or impliedly agreed to arbitrate.

The importance of this application lies in the fact that the applicant is trying to reach a non-signatory party with an interest in the dispute, and move crucially to non-signatory party with necessary funds to recover the commission which the arbitrator may award.

The respondent on the other hand, is trying to find ways to avoid the prospect of being brought before an arbitrator and the prospect of being held liable for a transaction in which they have an interest but for which they want to avoid liability altogether.

In the present case the respondent is a third party and a stranger to an arbitration agreement, but involved in or underlying issues in arbitration, can significantly affect the course of arbitration.

Therefore, in an arbitration unless there is a drag-along provision in the contracts between for example the contractor and a sub-contractor, third parties cannot be compelled to participate.

Arbitration form competence to adjudicate a dispute between parties comes from contract that they have agreed. Therefore, arbitration is a contractual dispute settlement forum.

As a contract, arbitration is also bound by principles of contract law, such as privity of contract, which implies that a contract only binds the parties.

Because arbitration is a voluntary dispute resolution mechanism, the arbitrator's authority and jurisdiction is generally considered to derive solely from the specific contractual language in the arbitration agreement.

Arbitrators who are faced with a request for a third party to join or intervene in an arbitration will therefore look first to the arbitration agreement to see what, if anything, the contracting parties contemplated with respect to third parties. Three possibilities exist: (1) a contract that expressly allows for joinder or intervention of third parties; (2) a contract that expressly prohibits joinder or intervention of third parties; and (3) a contract that is silent or vague regarding joinder or intervention of third parties.

Obviously, not every third party should be allowed entry into an existing arbitration and the arbitrator or court should consider the same based on the circumstances of each particular case.

The respondent could not be joined as a party in the present case by this court and the arbitrator could only be restricted in determining the addition of the respondent by construing the arbitration agreement.

This issue is resolved in the negative.

This application fails and is dismissed with no order as to costs.

I so Order.

SSEKAANA MUSA
JUDGE
15th/02/2019